Petition

81-610

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

NO._____

ALPHONSE DiMOLA

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the Trial Court abused its discretion in permitting the Government to reopen its case after both sides rested and argument had been entertained on petitioners Rule 29 motion.

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POINT

THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING THE GOVERNMENT TO REOPEN

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ITS CASE AFTER BOTH SIDES
RESTED AND ARGUMENT HAD
BEEN ENTERTAINED ON
PETITIONERS RULE 29 MOTION

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD
BE REVERSED AND THE INDICTMENT DIS-
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TRIAL ORDERED..... 20

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FOR THE SECOND CIRCUIT

To the Honorable, The Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The above named petitioner respectfully prays to this Court for a Writ of Certiorari to the United States Court of Appeals

for the Second Circuit as follows:

A.

OPINION BELOW

The United States Court of Appeals for the Second Circuit by a judgment entered the 5th day of June, 1981, affirmed a judgment in the United States District Court, Eastern District of New York, convicting petitioner of violations of Title 18 United States Code, Section 1341 and 2, after a jury trial before the Hon. Thomas Platt.

Thereafter a petition for rehearing in banc was filed with said Court which petition was denied on August 17, 1981.

The conviction was unanimously affirmed.

B.

THE GROUND ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Jurisdiction of this Court is invoked under Title 28 Section 1254, subdivision 1 of the United States Code, and Rule 19, subdivision 1

of the Rules of this Court.

The judgment sought to be review herein is the judgment of the United States Court of Appeals for the Second Circuit entered on June 5, 1981 as aforesaid. A copy is reproduced as Appendix A to this petition.

C.

THE QUESTION PRESENTED FOR REVIEW

Whether or not a District Court can permit the Government to reopen its case after both sides have rested and defense counsel has pointed to deficiencies in its case during argument pursuant to Rule 29 of the Federal Rules of Criminal Procedure without violating the defendants rights to a fair trial.

D.

THE CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Statues involved are Titled 18 U.S. Code Sections 1341 and 2.

The pertinent portions are set forth in the Appendix B of this petition.

E.

A CONCISE STATEMENT OF THE CASE AND THE MATERIAL FACTS PERTAINING TO CONSIDERATION OF THE QUESTIONS PRESENTED

1. Preliminary Statement

Petitioner, Alphonse DiMola, appealed from a judgment of the United States District Court for the Eastern District of New York (Hon. Thomas Platt) United States District Judge entered on February 20, 1981, thereafter in application for re-consideration by the Court in banc (See Appendix B) which motion was denied (See Appendix C).

2. Trial

KENNETH HARECHMAK testified that he is employed by the INA Insurance Company as a regional supervisor. Prior to becoming a supervisor he worked as an independent appraiser and was so employed in 1976. In 1976 he was working for the Chrysler Credit Corporation which was also known as Redisco.

In September, 1976 he was assigned to appraise a 1975 Mercedes Benz owned by a Peter Cancilla which was insured by INA. The vehicle was located at Critical Collision on 59th Street, Brooklyn, New York. (32-34, 1 A-3A)*. On September 28, 1976 he went to Critical Collision and viewed the vehicle which was parked across the street in front of another shop named City Wide Collision. (35, 4A). At that time he noticed front end damage and began making out his report.

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*Numerials in parenthesis refer to pages of the trial minutes while those preceded by the letter A refer to pages in appellants appendix, which was submitted to the United States Court of Appeals for Second Circuit.

The vehicle he inspected was silver with 16,847 miles on it, had a license number of PVC 99 (39-40, 5 A-6 A). The witness further testified that he was unable to complete his inspection of the vehicle at that time because of hidden damage which could only be assessed after the vehicle had been taken apart. (42, 7 A). On October 5 he returned again (43, 8 A) and concluded his inspection of the vehicle.

On October 15 he returned to Critical Collision, saw the vehicle in the shop, and met with appellant DiMola to discuss the estimate (45, 9 A). He had a discussion about the vehicle during which DiMola claimed engine damage while the witness disagreed. They could not agree on a repair price and returned a week later with his supervisor and spoke with DiMola again (57, 10 A).

Thereafter the Government introduced an INA draft made out to Peter Cancilla, through the witness.

On cross-examination the witness conceded that each time he went to Critical Collision to inspect

the car in question no one ever sought to conceal any of the damage or parts of it (71, 11 A). The witness dealt with the appellant on at least fifty prior occasions and never knew of or engaged in improper negotiations regarding loss claims (74-75 12 A-13 A). After negotiating with appellant and failing to reach an agreed loss figure he recommended two other body shops after which the claim was settled for approximately the figure he suggested (76, 78, 14 A, 15 A).

Less than one year later he was assigned to appraise a 1974 Rolls Royce owned by appellant Shevack which was located at Critical Collision (99, 16, A). Only July 15, 1977 he went to Critical Collision, viewed the vehicle and noted it was without wheels while noting its mileage, serial number, make year etc. (111, 17 A).

CALVIN HOEHLE testified that he was employed by the Uniguard Insurance Company as a claims appraiser and was so employed in 1976.

In September, 1976 he was assigned to investigate a claim by appellant Shevack regarding damage to his

1975 Mercedes Benz (84, 18 A). He went to view the vehicle at City Wide Collision which is across from Critical Collision (85, 19 A). The vehicle he inspected had heavy front end damage (86, 20 A). He then spoke to an individual at the shop who had his estimate prepared, reviewed it and agreed on a repair figure (89, 21 A). The vehicle was a silver color, had 16,847 miles on it an identification of 12-035825.

The car had been stripped, missing the front, rear bumper, grille, interior trim, panelling, seats and some body damage (112, 22 A). The following week he returned to Critical at which time he was informed to return because they had not obtained the necessary prices for the parts (116, 23 A).

On a subsequent visit he received a complete listing of parts with prices (117, 24 A) after which he spoke to the appellant and determined that he submitted a parts list to Rallye Motors and paid fifty dollars for prices being posted (120, 25 A). He then attempted to locate parts but was unable to do so and informed appellant of

that fact. After negotiations he agreed to pay $15,000 plus tax which was the maximum limit of the policy his company had written (122, 26 A).

About three weeks later he returned to Critical and saw the car in the state of being repaired (126 27 A).

On cross-examination the witness stated that appellant was happy with his efforts to secure parts for the vehicle (134, 135, 28A - 29A) refering to the Rolls Royce. In addition the agreed figure for repairs to the Mercedes Benz as $6,589.50 (157, 30 A).

CLIFFORD BRESETTE testified that he is a claims supervisor for the Uniguard Insurance Group and has been so employed for the last 13 years. The Uniguard Company file regarding appellant Shevack indicated that he had a claim regarding damage to a Mercedes in September, 1976. In addition he stated that it was Uniguards policy to tape record a claimaints statement with his knowledge when a claim is made (181, 31 A) after which a proof of loss form is mailed out (182, 32 A). Said form was received later by Uni-

guard through the mail on October 22, 1976 (191, 33 A), Mr. Shevack was subsequently paid by check the amount of $4,469.50 (sic) said item appears to actually read $6,489.50 (193, 34A).

The witness further stated that he also worked on Mr. Shevacks Rolls Royce claim in 1977 under a policy with a limit of $10,000 (197, 35 A). At one point Uniguard hired an outside investigator, Victor Miller, Inc., to look into Mr. Shevacks claim with regard to the Rolls Royce. Ultimately Uniguard paid Mr. Shevacks claim to the limit of its liability to writ: $10,000 (259, 36 A).

WOLFGANG MEYER testified that he is employed by Mercedes Benz of North America, distributors for the vehicle.

On November 21, 1978 he inspected a Mercedes Benz at the request of a Mr. O'Brian. He was shown certain photographs of a Mercedes Benz with front end damage and asked to inspect the one shown to determine if it could have sustained the damage shown by the photograph (300-301, 37 A-38A). After

the examination he determined that it did not appear that the vehicle he inspected sustained the damage of that depicted in the photographs shown (310, 39 A). The vehicle identification number of the vehicle exhibited to him was 116033-12-038029.

LEONARD A. MEYERS testified that he is an independent adjuster employed by York Claims Service and was so employed in 1977. In 1977 he was asked to handle a claim regarding Shevacks Rolls Royce (354, 40 A). He was contacted by a representative of Northeastern Fire who was the excess carrier on the policy (355, 41 A). His job was to coordinate with Uniguard the primary carrier but he was bound by Uniguards determination (364, 42 A).

Uniguard determined that the loss to the vehicle was $16,200 and therefore Northeastern was liable for excess coverage of $6,200. In the course of his work he received a telephone call from an individual who identified himself as Arthur Shevack regarding the Rolls Royce. He asked how fast he could get paid because he ordered parts from England and they were coming C.O.D. (357-358 43A-44A).

The company's check was issued on September 30 and sent to the agent of the company for Mr. Shevack.

WALTER WOLFSON testified that he owns Pennington Enterprises and that he buys and sell exotic cars (370, 45A). On August 20, 1977 an individual named Al approched him looking for parts for a Rolls Royce Silver Shadow (370-371, 45A-46A). He was shown a list of parts indicating substantial damage to the vehicle. He advised Al that he had some parts for which he gave him prices at which time Al asked him if he would increase the amount of material he actually bought (372, 47A). The items he wanted added the seat frames and wheels while the items in stock only included the grill and hub-caps (373, 48A). Thereafter he discussed with Al receiving something extra for adding the items and did in fact receive $400 (374, 49A). The witness then identified the appellant, DiMola, as the person named Al that he dealt with (376, 50A).

On cross-examination the witness indicated that when first interviewed by the agents he told them he actually sold DiMola all the parts on the bill

of sale (387, 51A) and that he paid $4,100 for the parts. In addition he told the Grand Jury he received a total of $1,900 plus the $400 extra previously referred to (389, 52A). While he told the agent it was $1500 plus $400 (391, 53A).

The witness further stated that if he had all the parts DiMola sought he would have sold them to him and DiMola would have bought them (405, 54A).

BRENDAN O'BRIEN testified that he is a United States Postal Inspector who obtained a search warrant for Mr. Shevacks Mercedes which was sold to a Mr. DiPuzo. The vehicle was a 1975 Mercedes Benz with Vin number 1603312038029 which he took to Globe Motors where Mr. Meyer inspected the car. (430-431, 55A-56A).

MANNY HILFMAN testified that he had been employed by Rolls Royce for twenty years working in numerous positions including office manager, president of a retail dealership.

The witness testified that a collision shop would have to order replacement parts from a Rolls Royce

franchised dealer while indicating that the parts in question were not stock parts in 1977-1978. (450-452, 51A-59A).

Rolls Royce would keep a record of each car made including each part for that car so that on an order the correct part would be sent. They were able to so determine by the vin number as a cross check (453-454, 60A-61A). A check of the company records indicated that no replacement parts were ordered for the Rolls in question (454-455, 61A-62A).

NEVILLE RAINFORD testified that he is a mechanic employed by a Rolls Royce dealer. He stated that the interiors are made from one roll of material with each part stamped with the individuals serial number (464-465, 63A-64A), while replacement parts do not have that number (466,65A).

On August 4, 1978 he was asked to examine the Rolls in question (469,66A) after which he concluded that the parts in the car were the original parts installed by Rolls Royce at the factory (470-471, 67A-68A).

SALLY KORZUN testified that in 1976-1977 she was employed by Uniguard Insurance Group in the Dover District Office as a secretary to the claims manager Mr. Bressette (527,69A). When she sent out accident report forms they would not be filled out but placed in an envelope and collected with the outgoing mail (529-530, 70A-71A). The forms would then be received back again through the mail and stamped on arrival (131,72A).

On the Governments reopened case the following witness was called:

ROBERT MILTON OBERCIAN testified that he owns a business that restores Rolls Royces and was previously employed by the George Howe Company which maintained and serviced the cars.

On or about September 22, 1977 Mr. Shevack's Rolls was brought in and worked on, on September 26, 27 and 29th. When the car came it had all its interior intact (733,73A).

RONALD MAXIM BARON testified that he is employed by Barco Auto Leasing and was so employed in 1977.

In August, 1977 he spoke with Mr. Shevack about Shevack selling his Rolls Royce to Barco and then leasing it back from them (745-746,74A-75A). On September 16, the deal was finalized and Barco paid Shevack $25,000. Prior to the payment he saw the vehicle which was in excellent condition (749-750, 76A-77A).

F.

BASIS FOR JURISDICTION IN
THE UNITED STATES DISTRICT COURT

The jurisdiction of the United States District Court for the Eastern District of New York was involved upon the ground that the crimes charged were Federal crimes, to wit: Title 18 United States Code Section 1341 and the ensuing conviction.

G.

ARGUMENT AMPLIFYING THE REASONS
RELIED ON FOR ALLOWANCE OF THE
WRIT

POINT

THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING THE GOVERNMENT TO REOPEN ITS CASE AFTER BOTH SIDES RESTED AND ARGUMENT HAD BEEN ENTERTAINED ON PETITIONERS RULE 29 MOTION

At the conclusion of all testimony in the instant matter, petitioners counsel moved pursuant to Rule 29 of the Federal Rules of Criminal Procedure for a judgment of acquittal. The motion of counsel was far from a proforma motion and occupied approximately 44 pages of the trial transcript. During the course of said argument the court interjected itself on numerous occasions stating to the government:

> "How are you going to negative the inference that Shevack took the car, said to DiMola, you haven't finished it, took the car, took the parts that he had removed according to you somebody had removed and

put them all back in himself or got somebody else to put them back in? (668).

"There is nothing in Critical Collision which shows they.... they finished the work, submitted a bill and put in such and such, by way of parts.....

How do you pin Critical responsibility on him when you haven't got him taking one sigle original part and putting it in the car?" (675).

"You haven't proved that they put one single piece in that car?" (676).

"It is not--if it had been in his custody and control until August 4th. I would agree with you. '78. But when it goes out of his custody some time between the end of July, 1st of August, '77, and next appears in somebody else's custody a year later, how do you pin him with it?.....(680)".

"Reasonable infernece if you found him in possession of any one of the original parts, yes. But there is no evidence at all that he ever had possession of the original parts." (688).

The question that presents itself is whether or not a defendant can be prejudiced by his counsels appempt to protect his rights, such as occurred in this matter. In essence, counsel in moving to dismiss the charges against the petitioner pointed to numerous deficiencies in the goverments case which were of concern to the Court. While the Court after extensive argument and deliberation denied the motion counsel would have been able to argue said deficiencies to the jury in summation. The Court rather than permitting such allowed the government to reopen its case to correct its initial presentation and close the gaps in its case.

Obviously the Second Circuits ruling now puts defense counsel in the position of refraining from arguing Rule 29 motions because of the Governments ability to capitalize on counsels ability to point to deficiencies in its case and correct such by reopening.

While it is conceded that it is within the discretion of the trial judge to permit counsel

for either side to reopen its case (United States v. Kenner. 354 F 2d 780 [2d Cir. 1965], cert. denied, 383 U.S. 958 [1966]; United States v. Williams, 336 F. 2d 183 [2d Cir.] cert. denied, 379 U.S. 827 [1964]. It is the petitioners contention that based upon the facts of this case it was an abuse of discretion herein. A reading of prior cases where this issue has been considered finds that each and every one is distinguishable from the instant one with none involving a reopening at such a critical state of the proceedings.

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED, OR IN THE ALTERNATIVE A NEW TRIAL ORDERED.

Dated: September 15, 1981

Respectfully submitted,

JEFFREY A. RABIN
of Counsel

JACOB R. EVSEROFF
Attorney for Petitioner

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

A stated Term of the United States Court of Appeals for the Second held at the United States Courthouse in the City of New York, on the Fifth day of June One thousand nine hundred and eighty one.

HONORABLE IRVING R. KAUFMAN,

HONORABLE JON O. NEWMAN,

Circuit Judges,

HONORABLE THOMAS F. MURPHY,

District Judge sitting by designation.

UNITED STATES OF AMERICA, Appellee, v. ARTHUR SHEVAK, AL DIMOLA AND CRITICAL COLLISION CORP. Appellants.	81-1074 81-1076 81-1078

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

1. Viewing the evidence in the light most favorable to the government, Glasser v. United States, 315 U.S. 60, 80 (1941), it is clear that the jury was presented with sufficient evidence to conclude that appellants participated in a scheme to collect insurance for false claims of damage to Shevack's automobile. See United States v. Lubrano , 529 F.2d 633, 636 (2d Cir. 1975), cert. denied, 429 U.S. 818 (1976).

2. It is within a trial judge's discretion to allow either side to re-open its case after it has rested, if prejudice will not result. United States v. Williams, 336 F 2d 183, 184 (2d Cir.),

cert. denied, 379 U.S. 827 (1964). Appellants here had sufficient time to meet the new evidence, did not claim surprise, and were not prejudiced by the introduction of evidence. See United States v. Kanovsky, 618 F 2d 229, 231 (2d Cir. 1980); United States v Dossey, 558 F. 2d 1336 (8th Cir. 1977). Accordingly, the district court's decision to allow the introduction of more evidence was not an abuse of discretion.

3. If, in summation, defendants attack the prosecution's failure to produce witnesses, the Government, in rebuttal, may comment on defendants' failure to call certain witnesses. United States v Sindona, 642 F.2d 792, 806 (2d Cir. 1980): United States v Kanovsky, supra, 618 F.2d at 232. Judge Platt's curative instructions informed the jury that the defendants did not have any obligation to offer proof. United States v. Burbar, 567 F.2d 192, 200 (2d Cir.), cert. denied, 434 U.S. 872 (1977). Accordingly, we reject appellants' claim that the Government's rebuttal summation deprived them of a fair trial.

4. In imposing sentence, the district court may consider the defendant's cooperation with the Government, Roberts v. United States, 445 U.S. 552, 558 (1980): United States v. Barnes, 604 F.2d 121, 154 (2d Cir. 1979), and need not state reasons for the sentence, although we prefer that he do so. United States v. Ciambone, 607 F. 2d 616, 627 (2d Cir. 1979). Judge Platt imposed a sentence within the statutory limits. United States v Sweig, 454 F. 2d 181, 183 (2d Cir. 1972). Accordingly, he acted within his discretion in sentencing Shevack.

IRVING R. KAUFMAN,

JON O. NEWMAN, Circuit Judges,

THOMAS F. MURPHY, District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
----------X

UNITED STATES OF AMERICA,
Appellee,

-against-

AL DiMOLA,
Appellant.
----------X

PETITION FOR RE-ARGUMENT
WITH SUGGESTION FOR
RE-HEARING EN BANC

AL DiMOLA, the petitioner herein respectfully applies, pursuant to Rules 35 (c) and 40 (a) of the Federal Rules of the appellate procedure for re-agrument or re-hearing en banc of the decision of this court, rendered June 5, 1981 (Kaufman J., Newman J. Murphy D.J.) affirming the lower courts decision that the jury was presented with sufficient evidence to conclude that appellant participated in a scheme to collect insurance for false claims and that it is within a trial judges discretion to allow either side to re-open its case after it has rested, if pre-

judice will not result. (Platt, D.J.)

SUMMARY OF ARGUMENT

Petitioner seeks re-argument of this appeal for the reason that the decision of this court (a copy of which is annexed hereto as Exhibit "A" and made a part hereof), reflects errors and misapprehensions of fact with respect to the course of proceedings in that nowhere in the trial did anyone testify that appellant ever removed, stripped or put back any of the parts or that appellant ever put stolen parts back in said Rolls Royce, and as a matter of law no prima-facie case was made against appellant. Further, this court ruled that it is within a trial judges discretion to allow either side to re-open its case after it has rested, if prejudice will not result.

Appellant made a rule 29 motion claiming that no prima-facie case was made and the district judge sort of agreed and told the A.U.S.A. he didn't think he did make a case and at that point suggested the A.U.S.A. re-open his case which he did, and certainly prejudiced resulted.

REASONS FOR GRANTING THE PETITION

Petitioner asks this court to reconsider his argument that no prima-facie case was made because no where in the record did anyone testify against appellant as to his replacing stolen parts or removing original parts from said Rolls Royce and coupled with the trial judge, after appellant making a rule 29 motion allowing and actually telling the A.U.S.A. to re-open its case in an effort to establish a prima-facie case is certainly prejudicial to appellant. Re-hearing of this appeal is requested for the purpose of correcting the mis-apprehension of fact and for reconsideration of the issues raised against an accurate rendition of the facts. Needless to say, it is petitioners position that upon reconsideration, it should be the opinion of the court that the Government did not establish a prima-facie case and that the re-opening of the case by the government after it had rested resulted in prejudice to the appellant.

It would appear that the Court in permitting reopening of the Governments case after argument on Rule 29 motions has concluded had determined to either negate the purpose of said motion or suppress defense arguments at that juncture.

While it was and is conceded that a trial court can, in its discretion, permit the reopening of a case theree comes a point when such is an abuse of discretion and an infringement of a defendants constitutional rights. To permit reopening at such a late state of the proceedings will compel defense counsel to refrain from making an indepth argument pointing out the deficiencies in the Governments case and resort only to proforma arguments for dismissal.

In this very matter the defendant was prejudiced by his counsels abaility to orally point to the deiciencies in the Governments case which deficiencies almost resulted in a dismissal by the trial judge. Even though the trial judge indicated he was going to submit the matter to the jury the reopening at this late state, deprived defense counsel of the opportunity to point to said deficiencies during closing argument. It cannot be said that the jury

would have returned the same verdict had the gaps in the Governments case remained.

This Court was concerned with prejudice to the defendant by the reopening and that prejudice has been shown. To put an accused own counsel in the position of weakening his defense directly infringes upon his right to a fair trial and the effective assistance of counsel.

It is most important therefore that the factual issues be clarified and corrected, even if the correction does not change the ultimate decision of this court so that the record will be accurate when its considered by the Supreme Court as a petition for certiorari.

CONCLUSION

For the reasons noted herein, the opinion of the court should be recalled and corrected and thereafter reconsidered in light of the issues raised herein.

In the event that this panel adheres to its present decision, is required that the original brief and appendix and this petition be circulated among the active judges of this court to determine whether a re-hearing en banc should be granted.

RESPECTFULLY SUBMITTED

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APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 17th day of August, One Thousand Nine Hundred and Eighty-One.

----------X

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

Nos. 81-1074
81-1076
81-1078

ARTHUR SHEVACK, AL DiMOLA AND
CRITICAL COLLISION CORP.,

Defendants-Appellants.

----------X

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Al DiMola,

Upon consideration by the panel that heard the

appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro,

Clerk